

**In the Matter of**

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**Allco Renewable Energy Limited and  
Windham Solar LLC, Petitioners**

**April 26, 2021**

**Response to Petition for Declaratory Ruling filed by Allco Renewable Energy Limited and Windham Solar LLC**

Allco Renewable Energy Limited and Windham Solar LLC, collectively referred to as the Petitioners, filed a petition for a declaratory ruling (the “Petition”) dated February 23, 2021, regarding application number 201615592 for a wastewater discharge permit (the “Application”) that NTE Connecticut LLC filed with the Department of Energy and Environmental Protection (“DEEP” or “Department”). The Petition specifically seeks the following rulings:

1. The final decision issued on January 20, 2021 (the “Final Decision”) by the Office of Adjudications of DEEP recommending that NTE be issued the requested permit to discharge wastewater is clearly erroneous and should be vacated and reconsidered;
2. The proposed discharge by NTE to the Killingly POTW is the functional equivalent of a direct discharge to the waters of the United States (“WOTUS”);
3. The Final Decision should be vacated and ignored because it fails to take a hard look at alternatives under the Clean Water Act (“CWA”) and fails to comply with EPA’s 404(b)(1) guidelines, and a permit cannot be issued unless and until DEEP takes a hard look at alternatives under the CWA and complies with EPA’s 404(b)(1) guidelines;
4. The Final Decision should be vacated and ignored because it fails to evaluate whether the 650-megawatt natural gas Killingly Energy Center power plant (the “Project”) satisfies the public interest requirement and a permit cannot be issued unless and until DEEP evaluates whether the Project satisfies the public interest requirement; and
5. The Final Decision should be vacated and ignored because it fails to determine whether the Project affects a special aquatic site and a permit cannot be issued unless and until DEEP determines whether the Project affects a special aquatic site.

## **Application Background and Procedural History**

NTE Connecticut, LLC (“NTE”) filed an application with DEEP on December 19, 2016, for a permit to discharge to the Killingly Publicly-Owned Treatment Works (“POTW”) a maximum daily flow of 90,000 gallons of wastewater associated with steam electric power generation operations at the proposed 650-megawatt combined cycle dual fuel combustion turbine electric generating facility known as Killingly Energy Center (“KEC”). NTE published notice of the application in the Norwich Bulletin on December 10, 2016. DEEP staff issued a Notice of Sufficiency to NTE on March 7, 2017, informing NTE that the application would be reviewed for technical adequacy. DEEP issued a Notice of Tentative Determination (“NTD”) on February 28, 2020, and published it in the Norwich Bulletin and the DEEP Public Notice webpage on March 5, 2020. Due to a delay associated with DEEP’s electronic notification system, DEEP reissued the Notice of Tentative Decision, dated April 23, 2020 and published the reissued NTD in the Norwich Bulletin and the DEEP Public Notice webpage on April 27, 2020. The NTD included a draft wastewater discharge permit based on the application and additional information NTE submitted to DEEP staff during the technical review. A public hearing was held on the application in response to a petition for a hearing and public comments were received and responded to in the hearing record. The proposed final decision was issued on January 4, 2021, and the final decision was issued on January 20, 2021.<sup>1</sup>

## **Analysis**

The first of the requested rulings generally requests that the final decision authorizing issuance of the draft permit upon review and approval of plans and specifications for the wastewater treatment system be vacated. The basis for this request is provided by the remaining statements which are divided into two categories. First, the Petitioners maintain that the activity requires a permit issued under the authority of the Clean Water Act. Second, the Petitioners allege that the application and its review failed to follow section 404 of the Clean Water Act and its implementing regulations and guidelines, including particular requirements to review alternatives, public interest, and impacts to special aquatic sites.

### **Requirement for Clean Water Act Authorization**

The Petition identifies reasons why the requested activity should be subject to the provisions of the CWA, including specific reference to its functional equivalency to a point source discharge. Further analysis on this issue is unnecessary and the Commissioner will not issue a declaratory ruling on it. The Department does not dispute that NTE’s proposed discharge of wastewater requires a wastewater discharge permit issued under the authority of the CWA as delegated to

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<sup>1</sup> The Petitioners sought reconsideration of the final decision and status as intervening parties. Both motions were denied as the proceeding had closed and the motions were filed after the deadline for seeking reconsideration.

the Department. In fact the Applicant sought and received a final decision recommending issuance of such a wastewater discharge permit upon approval of the applicant's final plans and specifications by the Department. Discharges to publicly owned treatment works that are eventually discharged to waters of the United States require permits under Connecticut General Statutes (Conn. Gen. Stat.) § 22a-430. The Department administers its wastewater discharge permitting program under a delegation of authority from the U.S. Environmental Protection Agency. Permits under Conn. Gen. Stat. § 22a-430 are only issued after an application is reviewed in accordance with applicable state and federal requirements. In the particular case where the wastewater is going to an authorized publicly owned treatment works, the Application identified the proposed discharge as a categorical point source of steam electric power generation wastewaters. Therefore, it is subject to the categorical standards and limitations set forth in Title 40 Part 423 of the Code of Federal Regulations (40 CFR 423) and section 22a-430-4(s) of the Regulations of Connecticut State Agencies (RCSA). As a discharge to the sanitary sewer, which shall be initiated after June 7, 2013, the proposed discharge is specifically subject to the federal requirements established in 40 CFR 423.17(b) (Pretreatment Standards for New Sources). The hearing record and proposed final decision confirmed the Application's compliance with these requirements resulting in the final recommendation that the permit be issued after review and approval of plans and specifications of the wastewater treatment system.<sup>2</sup>

This information is all clearly provided in the administrative record developed during the contested case hearing that held on the application in accordance with the Uniform Administrative Procedure Act and the Department's Rules of Practice. The hearing record confirms that the activity requires a wastewater discharge permit and the application was filed and reviewed with this understanding. The Department does not dispute that applicable portions of the CWA govern the activity proposed in the application.<sup>3</sup> No ruling will be issued in response to the requested ruling.

### **Compliance with CWA Section 404 and implementing Regulations and Guidelines**

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<sup>2</sup> The effluent limitations and conditions contained in the draft permit were established to protect the waters of the state from pollution, ensure compliance with Chapter 446K of the CGS and regulations adopted thereunder, and to ensure consistency with the provisions of the Clean Water Act. More specifically, the terms and conditions of the draft permit are based on the federal requirements of 40 CFR 423, specifically, 40 CFR 423.17(b) (Steam Electric Power Generating Point Source Category, Pretreatment Standards for New Sources (PSNS) after June 7, 2013), the water pollution control regulations of section 22a-430 of the RCSA, and a case-by-case determination using best professional judgement as specified in sections 22a-430-(l) and (m) of the RCSA. Additionally, the local sewer use limits established in Chapter 15 (Water, Sewers and Sewage Disposal) of the Town of Killingly's Code of Ordinances were incorporated into the draft permit in accordance with DEEP's standard practice.

<sup>3</sup> If there were more specific issues raised with the merits of the application and its review, then they should have been raised during the administrative hearing process to ensure the Department staff and the applicant were accorded due process to address any allegations within the administrative hearing process provided under the UAPA.

While the Department acknowledges above that the activity requires a wastewater discharge permit issued under the authority of the CWA, it does not agree that the proposed activity is subject to the requirements of section 404 of the CWA. Section 404 is reserved for the U.S. Army Corps of Engineers (USACE) to permit the discharge of dredged or fill materials to the navigable waters of the United States and does not apply to the wastewater discharge requested in the Application. “The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” 33 USC 1344(a). The scope of this authority is also clarified in fact sheets for the program. “Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands.” [https://www.epa.gov/sites/production/files/201503/documents/404\\_reg\\_authority\\_fact\\_sheet.pdf](https://www.epa.gov/sites/production/files/201503/documents/404_reg_authority_fact_sheet.pdf), 4/23/2021

The Petitioners identify section 404(b)(1) guidelines promulgated at 40 CFR 230, as support for vacating the final decision. More specifically, requested ruling 3 of the Petition references a review of alternatives required by 40 CFR 230.5 and requested ruling 5 references the review of impacts on special aquatic sites found at 40 CFR 230.40. These guidelines do not apply to the requested wastewater discharge. On their face, the guidelines specify that they only apply to the discharge of dredged or fill material. “The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States.” 40 CFR 230.2(a). “These Guidelines will be applied in the review of proposed discharges of dredged or fill material into navigable waters which lie inside the baseline from which the territorial sea is measured, and the discharge of fill material into the territorial sea ....” 40 CFR 230.2(b). These requirements clearly do not apply to the proposed activity as the proposed activity does not involve in any way the discharge of dredged or fill material and does not in any way anticipate the use or specification of any disposal sites for the discharge of dredged or fill material into the waters of the United States. The proposed activity subject to permit requirements is the discharge of wastewater through the POTW. The activity is not subject to section 404 but is subject to the National Pollution Discharge Elimination System permit program as authorized by section 402 of the CWA. And as implemented in Connecticut under the authority of Conn. Gen. Stat, § 22a-430 and its implementing regulations.

In addition to the guidelines promulgated at 40 CFR 230, the Petitioners point to other inapplicable regulatory requirements related to permits issued by USACE under section 404 to support the request to vacate the final decision. Again, these requirements are inapplicable on their face. The Petitioners specifically reference requirements to review impacts on the public interest under 33 CFR 320.4. This specific review for impacts on the public interest is inapplicable to the Application.<sup>4</sup> “This part and the parts that follow (33 CFR parts 321 through

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<sup>4</sup> While the public interest review specifically cited by the Petitioners is inapplicable, the Department recognizes the overall public interest in clean water and conducted its review of the subject application with that goal in mind in ensuring the permitted wastewater discharge would not cause pollution to the waters of the state in violation of Conn.Gen.Stat. § 22a-430 and its implementing regulations.

330) prescribe the statutory authorities, and general and special policies and procedures applicable to the review of applications for Department of the Army (DA) permits for controlling certain activities in waters of the United States or the oceans.” 33 CFR 320.1(b). As specified in section 404 of the CWA, USACE authority is limited to permitting the discharge of dredged or fill material and does not apply to wastewater discharges as proposed in the Application. The federal regulations continue to specify activities covered by the section 404 requirements.

Parts 321 through 324 and 330 address special policies and procedures applicable to the following specific classes of activities: (1) Dams or dikes in navigable waters of the United States (part 321); (2) Other structures or work including excavation, dredging, and/or disposal activities, in navigable waters of the United States (part 322); (3) Activities that alter or modify the course, condition, location, or capacity of a navigable water of the United States (part 322); (4) Construction of artificial islands, installations, and other devices on the outer continental shelf (part 322); (5) Discharges of dredged or fill material into waters of the United States (part 323); (6) Activities involving the transportation of dredged material for the purpose of disposal in ocean waters (part 324); and (7) Nationwide general permits for certain categories of activities (part 330).

Id.

The proposed activity does not fall into any of the categories cited and such Department of the Army (DA) permits are not required for the activity proposed by the Application.

The section 404 regulations clarify the limited role that USACE will play in the review of applications filed under the state’s authorized NPDES permitting program.

Section 402 of the Clean Water Act authorizes EPA to issue permits under procedures established to implement the National Pollutant Discharge Elimination System (NPDES) program. The administration of this program can be, and in most cases has been, delegated to individual states. Section 402(b)(6) states that no NPDES permit will be issued if the Chief of Engineers, acting for the Secretary of the Army and after consulting with the U.S. Coast Guard, determines that navigation and anchorage in any navigable water will be substantially impaired as a result of a proposed activity.

33 CFR 320.3(n).

This further clarifies the distinction between USACE authority under section 404 to permit the discharge of dredged and fill materials and the authority of state delegees like DEEP under the section 402 NPDES program to permit wastewater discharges as proposed in the Application.

### **The Procedural Nature of the Requested Rulings Cannot Be Accommodated in a Declaratory Ruling**

The time to examine the technical merits of the Application and the final decision of the department to recommend issuance of a permit has passed. The Petition takes issue with what might have been addressed in the permit proceeding – and attempts to raise these issues in a

wholly different proceeding. This attempt ignores, and has the effect of rendering irrelevant, the public participation process outlined in the applicable statutes and regulations.

Since the administrative permitting process is available to any person with concerns about the proposed activity under permitting review, there was an adequate forum in which the Petitioners should have raised their concern about whether the Permittee satisfied the requirements of Conn. Gen. Stat. § 22a-430 and its implementing regulations. DEEP's review standards include public comment as an integral means to ensure that there are meaningful opportunities for public involvement by any person that may be impacted by the application for permitting an activity requiring a permit under those authorities. The Petitioners did not avail themselves of the opportunity for participation from the time the application was filed and through the public hearing process until the hearing process had been closed by the issuance of the final decision.

The Petitioners will not be provided an additional opportunity to challenge an administrative permitting process through the declaratory ruling process absent appropriate questions concerning the applicability of a statute, regulation, or final decision of the Department to the application, its review, and the final decision as issued.<sup>5</sup> A final decision carries with it some level of finality from a factual and technical perspective and once such a decision is reached and the Applicant is vested with certain rights that cannot be ignored. The declaratory ruling authority does not permit the commissioner to disregard the other administrative requirements associated with taking the requested action on a final decision.

## **Conclusion**

As discussed above, the Department reviewed the application for the proposed activity in accordance with applicable state and federal law, including section 402 of the Clean Water Act and applicable state requirements, including Conn. Gen. Stat. § 22a-430 and implementing regulations. In addition, the justification for the requested rulings mistakenly relies in part on provisions of section 404 of the Clean Water Act and its implementing regulations that on their face do not apply to the proposed activity. Finally, the application was subject to a very public

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<sup>5</sup> The language regarding the scope of a declaratory ruling within Conn. Gen. Stat. § 4-176 is identical to language governing the scope of the court's declaratory judgment authority under Conn. Gen. Stat. § 4-175. Although the courts may not have clearly discussed any topical limitations on declaratory rulings, there is a long-standing history of case law regarding the court's authority to answer certain inquiries with a declaratory judgment. What is most clear is that declaratory judgment jurisdiction is not open-ended and is not intended to serve as an end around other administrative processes. "General Statutes § 4-175 does not authorize the plaintiff to bring an action. The plaintiff's requested relief demonstrated her lack of standing. She did not ask the court to decide whether a regulation is valid or whether a regulation, statute or decision applied to the facts of this case. Rather, she asked that the court overrule the determination by the department's subsurface sewage experts that the Friedlaenders' septic system may be installed provided they meet five modifications set out in the recommended approval. We conclude, therefore, that the court properly determined that such relief was not available under § 4-175." Pinchbeck v. Dep't of Pub. Health, 65 Conn. App. 201, 206-07, cert. denied, 258 Conn. 928 (2001).

proceeding, including a public hearing, in which the Petitioners did not participate – not even to offer any comment on the application that could have been affectively addressed during that process. For these reasons and in accordance with Conn. Gen. Stat, § 4-176(e)((5), the commissioner has decided not to issue a declaratory ruling in response to the Petition.



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Katherine S. Dykes  
Commissioner